

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.**

**CWP No.639/2006**

**Reserved on.28.9.2007**

**Decided on.5.10.2007**

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**Ramesh Kumar Mahajan.**

**...Petitioner.**

**Versus**

**State of H.P. & another.**

**...Respondents**

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*Coram*

**The Hon'ble Mr. Justice Rajiv Sharma, J.**

*Whether approved for reporting ?<sup>1</sup>.yes.*

**For the petitioner : Mr. Anand Sharma, Advocate.**

**For the respondents Mr. M.S. Chandel, Advocate General with Ms. Meenakashi Sharma, Deputy Advocate General for respondent No.1.**

**Mr. Adarsh Vashisht, Advocate for respondent No.2**

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**Rajiv Sharma, J.**

The brief facts necessary for the adjudication of this petition are that respondent No.2 had issued notice to the petitioner on 8<sup>th</sup> September, 2003 under section 211 (i) (a) of the H.P. Municipal Act, 1994 for carrying out unauthorized construction. The respondent No.2 issued another notice to the petitioner dated 12<sup>th</sup> September, 2003 under section 211 (5) of the H.P. Municipal Act, 1994 whereby the petitioner was asked to show cause within 24 hours from the receipt of the notice that why a fine of Rs. 1,000/- and further for non-compliance of the notice and continuous of work, Rs. 50/- per day be not imposed. The petitioner submitted reply to the notice dated 12<sup>th</sup> September, 2003 stating therein that due to heavy rain during the month of August, 2003, some cracks had developed in the walls and existing slab and those cracks were repaired by him. The

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<sup>1</sup> *Whether the reporters of Local Papers may be allowed to see the judgment?* yes

Executive Officer of the respondent No.2-Council directed the petitioner to demolish the unauthorized construction of toilet within seven days from the receipt of the notice. He preferred an appeal under section 212 of the H.P. Municipal Act, 1994 against the order dated 29<sup>th</sup> September, 2003 passed by the Executive Officer of the respondent No.2-council before the learned District Judge, Chamba Division, Chamba. The learned District Judge Chamba vide judgment dated 6<sup>th</sup> July, 2004 allowed the appeal and the impugned order dated 29<sup>th</sup> September, 2003 was set aside and the matter was remanded/remitted to the Municipal Council, Dalhousie with the direction to pass a fresh and speaking order after affording effective and reasonable opportunity to the petitioner. The petitioner after the judgment dated 6.7.2004 filed fresh replies to the show cause notices dated 8<sup>th</sup> September, 2003 and 12<sup>th</sup> September, 2003. Thereafter the Administrative Officer passed the order on 4<sup>th</sup> July, 2005. He ordered that:

- (i) the unauthorized toilet constructed on khasra No.725/2 be demolished;
- (ii) a case for encroachment on Government land be filed against the defaulter within a period of one week and compliance be reported to him;
- and (iii) funds deposited by the petitioner for sewerage connection for unauthorized toilet be returned to him forthwith.

In sequel to the order passed by the Administrative Order dated 4<sup>th</sup> July, 2005, the Executive Officer of the respondent No.2-council passed the order on 8<sup>th</sup> July, 2005 directing the demolition of unauthorized construction of toilet within a period of one month, failing which the same was to be demolished by the Municipal Council.

Feeling aggrieved by the order dated 8<sup>th</sup> July, 2005, the petitioner preferred an appeal before the learned District Judge, Chamba Division, Chamba under section 212 of the H.P. Municipal Act, 1994. The appeal

preferred by the petitioner was dismissed by the learned District judge, Chamba on 23<sup>rd</sup> June, 2006.

Mr. Anand Sharma, Advocate has strenuously argued that the order dated 4<sup>th</sup> July, 2005, 8<sup>th</sup> July, 2005 and the judgment dated 23<sup>rd</sup> June, 2006 passed by the learned District Judge, Chamba are not sustainable in the eyes of law for non-compliance of the principle of natural justice.

The learned Advocate General and Mr. Adarsh Vashist, Advocate have supported the orders dated 4<sup>th</sup> July, 2005, 8<sup>th</sup> July, 2005 and judgment dated 23<sup>rd</sup> June, 2006.

I have heard the learned counsel for the parties and perused the record.

The first notice was issued to the petitioner on 8<sup>th</sup> September, 2003 under section 211 (i) (a) of the H.P. Municipal Act, 1994 and the second notice was issued to him under section 211 (5) of the H.P. Municipal Act, 1994. He had filed the reply to the notice dated 12<sup>th</sup> September, 2003 and adverse order was passed against the petitioner on 29<sup>th</sup> September, 2003 by the Executive Officer, Municipal Council, Dalshousie which was set aside by the learned District Judge on 6<sup>th</sup> July, 2004. The petitioner had filed the fresh replies to the notices dated 8<sup>th</sup> September, 2003 and 12<sup>th</sup> September, 2003. It will be apt to reproduce the findings along with directions recorded by the Administrative Officer in his order dated 4<sup>th</sup> July, 2005, which reads thus:

- 1. "MC Dalhousie has never accorded permission to the appellant/applicant or to his father to construct toilet (the unauthorized portion). This fact has been admitted by the applicant himself in his written statement. In fact he has carried the entire unauthorized construction quite recently showing thumb to TCP Act and MC bye laws.**

2. It is not correct that the appellant/applicant has carried out the repair, re-roofing of the existing toilet. In fact he has constructed a new toilet in Khasra No. 725/2 that too on Government land (The apploicnat/appellant has himself admitted that after settlement his house was allotted khasra No. 724). MC Dalhousie never accorded nor has competence to accord him permission to undertake construction on Government land and encroach upon it. He has as such not only carried out unauthorized construction but also encroached upon the Government land.
3. As far as the question of MC Dalhousie according permission to him to give a sewerage connection to the toilet (the unauthorized one), I have gone through the records of MC Dalhouse. Through he has deposited fee for three sewerage connection vide MC receipt No.15 dated 8.9.03 he has actually been given two sewerage connection and the money of third connection which had deposited for the unauthorized toilet is lying with MC Dalhousie. The record of MC Dalhousie reveals that the MC Dalhousie has never passed any orders to the plumber to connect the unauthorized toilet with the sewerage line.

In view of the above discussion and conclusion it is ordered that:

1. The unauthorized toilet constructed on khasra No.725/2 be demolished.
2. A case for encroachment on Government land be filed in the competent court against the defaulter within a period of one week and compliance report be reported to me.
3. Funds deposited by the petitioner for sewerage connection for unauthorized toilet be returned to him forthwith. “

Order dated 4<sup>th</sup> July, 2005 was not placed on record by either of the parties and it was only produced during the course of hearing by Mr. Adarsh Vashist, Advocate.

The two things emerge from the findings recorded by the Administrative Officer: (i) according to the Administrative Officer, petitioner

has admitted in his written statement that the M.C. Dalhousie had never accorded permission to the petitioner or to his father to construct toilet (unauthorized portion) and (ii) the M.C. Dalhousie never accorded nor has competence to accord him permission to undertake construction on a Government land and encroach upon it.

I have carefully gone through the reply filed by the petitioner to the show cause notices issued on 8<sup>th</sup> September, 2003 and 12<sup>th</sup> September, 2003. The petitioner had not made any admission as recorded by the Administrative Officer. The second issue is with regard to the alleged encroachment made by the petitioner on the Government land on which the construction has been raised. It is evident from the text of the notices i.e. dated 8<sup>th</sup> September, 2003 and 12<sup>th</sup> September, 2003 that the petitioner had never been issued any show cause notice that he had encroached upon the Government land and had raised the unauthorized construction. In the absence of a specific notice to the petitioner, findings could not be recorded to his detriment by the Administrative Officer. The order passed by the Executive Officer is based on the order passed by the Administrative Officer dated 4<sup>th</sup> July, 2005 as is evident from the order dated 8<sup>th</sup> July, 2005. Since the findings recorded by the Administrative Officer were not in accordance with law, the same could not be relied upon by the Executive Officer in his order dated 8<sup>th</sup> July, 2005. The appellate authority had also relied upon the order passed by the Administrative Officer on 4<sup>th</sup> July, 2005. The petitioner had not admitted anything as projected in the judgment more particularly para 11 of the judgment of the District Judge dated 23<sup>rd</sup> June, 2006. The learned District Judge has failed to notice that the petitioner was not ever put to notice that he had encroached upon the Government land and raised the unauthorized construction.

Their Lordships of the Hon'ble Supreme Court has held in ***Commissioner of Central Excise, Bangalore Versus Brindavan Beverages (P) Ltd. and others; (2007) 5 SCC 388*** that if the allegations in the show cause notice are not specific and are on the contrary vague, lack details/unintelligible that will be sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. Their Lordships have held as under:

**“We find that in the show cause notice there was nothing specific as to the role of the respondents, if any. The arrangements as alleged have not been shown to be within the knowledge or at the behest or with the connivance of the respondents. Independent arrangements were entered into by the respondents with the franchise holder. On a perusal of the show cause notice the stand of the respondents clearly gets established.**

**There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted. “**

In the present case also the petitioner was never issued any notice to the effect that he had encroached upon the Government land and has raised unauthorized construction on that land. Despite that the findings

have been recorded by the authorities that the petitioner had encroached upon the Government land and raised construction thereon without the permission of the Municipal Corporation, Dalhousie.

The findings recorded by the appellate authority that there was admission by the petitioner to the effect that no permission was accorded to him or his father on the basis of the reply filed to the notices and he has encroached upon the Government land are not borne out from the record. Accordingly, the findings recorded by the appellate court are contrary to record and liable to be interfered.

The upshot of the above discussion is that:

- 1. petitioner had not made any admission as projected in order dated 4<sup>th</sup> July, 2005 and the judgment rendered by the learned District Judge dated 23<sup>rd</sup> June, 2006;**
- 2. no show cause notice was issued to the petitioner to the effect that he had encroached upon the Government land and has also raised unauthorized construction on this land;**
- 3. findings recorded by the Administrative Officer, Executive Officer in order dated 4<sup>th</sup> July, 2005 as well as 8<sup>th</sup> July, 2005 are contrary to the record. The findings recoded by the learned District Judge are contrary to the record.**

Accordingly, the writ petition is allowed. The judgment dated 23<sup>rd</sup> June, 2006 is quashed and set aside. The respondent No.2 is directed to decide the matter afresh on the basis of the reply filed by him to the show cause notices dated 8<sup>th</sup> September, 2003 and 12<sup>th</sup> September, 2003. There shall be no order as to costs.

**( Rajiv Sharma), Judge**

October 5, 2007

*\*Awasthi\**